UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 8

CERTAINTEED CORP.		
and	**Case**	**08-CA-073922**
UNITED STEELWORKERS INTERNATIONAL UNION, LOCAL 363, A/W UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION		

REPLY OF THE ACTING GENERAL COUNSEL IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS THE COMPLAINT

Pursuant to Sections 102.24 and 102.50 of the Rules and Regulations of the National Labor Relations Board, the undersigned Counsel for the Acting General Counsel files this Reply In Opposition To Respondent's Motion To Dismiss The Complaint. The Respondent has moved to dismiss the complaint based solely on its contention that this matter should be deferred to the grievance-arbitration procedure of the parties' collective bargaining agreement. It is the position of the Acting General Counsel that this case is not appropriately deferred to an arbitrator to decide because it presents a statutory issue rather than a matter of contract interpretation.

I. Introduction

The Complaint alleges that the Respondent acted in violation of Section 8(a)(5) and (1) of the Act by failing and refusing to bargain with the Charging Party Union concerning the implementation of a new policy banning smoking from the workplace and the effects of that policy on bargaining unit employees. The Respondent, on or about October 12, 2011, October 14, 2011 and January 11, 2012, by Human Resource Manager Edward Miller orally and by letter

announced its refusal to bargain with the Union regarding the Respondent's announced "Tobacco-Free Workplace Policy."

The Respondent maintains that its unilateral action is justified based on its interpretation of Article XXIX of the contract (Management Rights). The Respondent also relies upon the grievance provisions of the contract at Article XVI, arguing that the grievance procedure is broad enough to cover any disputed issues related to the management rights clause and thus that the case should be deferred.[1] For the reasons outlined below, the Acting General Counsel respectfully submits that the Respondent's Motion should be denied.

II. Factual Background

The Employer and the Union have a bargaining relationship, most recently embodied in a collective bargaining agreement that became effective from November 1, 2009 and remains in effect through October 31, 2012. The Union represents a unit of employees employed at the Employer's Avery, Ohio, facility, described in the collective bargaining agreement as follows:

> All of the company's employees at its Avery, Ohio, plant, but excluding office employees, supervisors, professional employees, technicians, people in training for supervisory work, watchmen, gatemen, and guards as defined in the National Labor Relations Act as amended.

The collective bargaining agreement, at Article XXIX, contains a "Rights of Management" provision, and at Article XVI the parties' "Grievance Procedure."

Plant Rules Regarding Smoking

The collective bargaining agreement does not contain any specific rules regarding smoking at the Avery Plant. However, the plant has had a smoking policy. The policy allows for smoking in certain designated areas and the policy is addressed in three separate places. The

"CertainTeed – Avery Plant General Plant Rules," at "Level II" No. 6, recites that smoking in non-smoking areas is a Level II offense that can lead to progressive discipline as outlined in the General Plant Rules. The smoking policy is also addressed in the "CertainTeed – Avery Plant Safety Rules" and "CertainTeed's Golden Rules For Safety."

By memorandum dated July 28, 2011 and signed by Ed Miller, Human Resource Manager, the Employer notified employees that beginning July 1, 2012 Saint Gobain, Respondent's parent corporation, was requiring all business units, including the Avery plant, to become tobacco-free.

Union Orally Requests Bargaining

During early August, 2011 the Union, by Local 363 President Jim Kimberlin, orally requested that the Employer meet and bargain with the Union regarding the proposed smoking policy change. Plant Manager Mark Hyde initially denied Kimberlin's request. Subsequent to a letter dated September 22, 2011 from Kimberlin to Ed Miller formally requesting to meet and bargain regarding the rule, the parties met on October 12, 2011. The meeting, which the Union presumed would lead to bargaining over the policy, instead became an informational question and answer session only.

Subsequent Correspondence Between Parties

After the October 12, 2011 meeting concluded, Ed Miller sent a letter to the Union dated October 14, 2011 reiterating the Employer's position that it has the right to modify and implement the smoking policy. The Union responded to Miller's letter with letters of its own, dated December 6, 2011 and January 9, 2012, formally requesting to meet and bargain with the

Employer. The Employer, by letter dated January 11, 2012, denied the Union's request to meet and bargain regarding the proposed smoking policy change.[2]

III. Legal Standards, Analysis and Argument

It is well settled that a smoking policy is a mandatory subject of bargaining. *Klein Tools*, *319 NLRB 674 (1995)*. It is equally well settled that a waiver of the statutory right to bargain over a mandatory subject will not be inferred from a broadly worded management rights clause. *Suffolk Child Development Center*, *277 NLRB 1345 (1985)*. Rather, a waiver of the right to bargain must be "clear and unmistakable." *Provena St. Joseph Medical Center*, *350 NLRB 808 (2007)*. Compare, *Airo Die Castings, Inc.*, *354 NLRB 92 (2009)*.

It is uncontroverted that the collective bargaining agreement between the parties contains neither a smoking policy nor a clear and unmistakable waiver of the Union's right to bargain over such a policy. Certainly the management rights provision that Respondent relies on falls far short of that standard.

It is true that at the facility involved here the Employer had promulgated Plant Rules including rules that punished employees for smoking in certain designated areas. It is also true that there is no evidence that the Union had sought to bargain these particular rules or the underlying policy as related to smoking at the plant. Be that as it may, settled Board law holds that even a union's past acquiescence in an employer's unilateral actions over a particular matter will not be found to constitute a waiver by the Union of the right to bargain in the future over that matter or over changes the employer wishes to make in its past treatment of the matter. *Owens-Corning Fiberglas*, *282 NLRB 609 (1987)*. Furthermore, any Employer claim that Union

[2] Specifically, at Paragraph 3 of the Employer's January 11, 2012 letter, Miller wrote "the Company has the contractual right to implement workplace policies under the provisions set forth in Article XXIX (Rights of Management). Accordingly, your request to collectively bargain over the Tobacco Free Workplace Policy is respectfully denied." See Respondent's Exh. 11.

acquiescence in the existing policy, one that merely designated places in the plant where smoking was allowed and setting out penalties for smoking in places where it was not allowed, surely falls of its own weight. This is true since the unilateral change that the Employer insisted upon here was not some minor modification of the existing policy that might have only minor impact on employees but rather it was a complete ban on smoking anywhere on plant premises. Clearly, this was a significant matter about which the Union had every right and incentive to demand bargaining.

Insofar as the intersection between arbitration and Board law is concerned, two points are worth noting: first, if this matter were to be deferred to arbitration, given the facts as we know them and as outlined above, an arbitral award in favor of the Company would almost certainly be found repugnant under the familiar standards of *Spielberg* review. See, *Spielberg Mfg. Co.*, *112 NLRB 1080 (1955)* and its progeny. Second, even should an arbitrator go beyond the four corners of the agreement which, as we have shown, does not contain any clause or provision concerning smoking, and issue an award in favor of the Union, that arbitrator could not provide a full and effective remedy. Thus, only the Board can fully remedy the Respondent's unlawful conduct by requiring not only that it rescind the unilateral change but also that it bargain in good faith with the Union about any future proposed changes in the smoking policy. An arbitrator, moreover, could not provide an effective remedy with respect to the Union's right to bargain over the effects of the no-smoking policy.

In passing we note that the Respondent's reliance on *Wonder Bread, a Div. of Interstate Brands Corp., 343 NLRB 55 (2004)* is entirely misplaced. In that case, Chairman Battista and Members Schaumber and Meisburg dismissed a complaint, finding that the unilateral change alleged there should be deferred to arbitration. That case, however, is distinguishable from the

instant one on several key facts. First, in *Wonder Bread*, the employer sought to implement employee physicals in order to comply with US Department of Transportation requirements. There is no such factor compelling the Respondent's action in the instant case. Secondly, the union in *Wonder Bread* filed a grievance, thereby implicitly acknowledging that the matter was arbitrable. No such grievance was filed by the Union here and there is no admission here by the Union that the matter is arbitrable. Finally, in *Wonder Bread*, the Board panel focused on language in the grievance procedure that broadly opened use of the procedure to "any difference…between the Company and the Union as to the interpretation" of the Agreement. *At 56.* The Board read this language to mean that any matter could be brought to arbitration as long as it arguably involved contract interpretation. Accordingly, the Board construed the grievance procedure as open even as to issues that went beyond the contract language as long as contract interpretation was part of the decision-making process. The grievance-arbitration procedure in the instant case does not read so broadly. It is limited to "matters involving interpretation of this Agreement and alleged violations of its terms."

IV. Conclusion

The Respondent's smoking policy is a mandatory subject of bargaining. No evidence exists to establish that the Union clearly and unmistakably waived its statutory right to bargain over any proposed changes to the smoking policy. Specifically, there is no express contractual language, bargaining history or acquiescence on the part of the Union to arrive at such a determination. Based upon the above, the Acting General Counsel respectfully submits that the Respondent's Motion To Dismiss should be denied and that an Administrative Law Judge should determine the merits of this case at hearing.

Respectfully submitted,

/s/ Gregory M. Gleine

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CERTIFICATE OF SERVICE

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